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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORLAND DIVISION

RON MOHOLT, an individual

Plaintiff,

v.

DOONEY & BOURKE, INC., a Connecticut corporation,

Defendant.

Case No. 3:13-CV-01026-SI

PLAINTIFF'S SUPPLEMENTAL TRIAL MEMORANDUM - USE OF MERCHANDISERS

Plaintiff submits this memorandum in response to an issue raised by the Court at the April 2, 2015, pre-trial conference. The Court inquired if the parties were aware of any case law which discussed whether an individual may be classified as an employee if he has the ability to hire other employees to perform a part of his work; i.e. Mr. Moholt's hiring of merchandisers. This issue was recently analyzed by the Ninth Circuit Court of Appeals. Such evidence did not preclude the Court from

finding of the existence of an employment relationship. *Slayman v. FedEx Ground Package System, Inc.*, ____ F. 3d ____ (2014); 2014 WL 4211422.

The plaintiffs in *Slayman* were former FedEx drivers who represented two classes comprising approximately 363 individuals who were full-time delivery drivers for FedEx in Oregon between 1999 and 2009. FedEx characterized its drivers as independent contractors who worked under a FedEx Operating Agreement (“OA”). The specific details of the drivers working relationship with FedEx are described in substantial detail in the opinion. Among the factors described, “[t]he OA allows drivers to operate more than one vehicle and route, but only ‘with the consent of FedEx’ and only if ‘consistent with the capacity of the [driver’s] terminal.’ **Drivers may also hire third parties to help perform their work.** Third-party helpers must be ‘qualified pursuant to applicable federal, state and municipal safety standards and [FedEx’s] Safe Driving Standards.’ They must be ‘fully trained’ and must ‘conform fully’ with the OA. **Drivers ‘in good standing’ under the OA may assign their rights and obligations to replacement drivers,** but any such replacement must be ‘acceptable to FedEx.’ ” *Id* @ *3. *Emphasis added.*

After considering the complexities of the drivers relationships with FedEx, and following a review of Oregon law and case law, the Court concluded that it was error for the trial court to have granted summary judgment for FedEx. The Court further concluded that summary judgment for the drivers was appropriate due to the evidence that the drivers were employees under both the right-to-control and economic-realities tests. *Id* @ *5-6.

The evidence that FedEx permits drivers to assign their contractual rights and to use replacement drivers or a helper, subject to the approval of FedEx, did not defeat the conclusion that the drivers were employees. *Id*. @ *10. The *Slayman* Court considered former Oregon cases which concluded that entrepreneurial opportunities do not undermine a finding of employee status when a company must consent to its workers’ exercise of those opportunities, noting that the Oregon Supreme Court has held that the plaintiff was an employee where he could hire a driver with the employer’s consent. *Blaine v. Ross Lumber Co.*, 224 Or. 227, 355 P.2d 461, 465 (Or. 1960). A worker was an

employee where his choice of helper was subject to the approval of the employer. *Collins v. Anderson*, 40 Or. App. 765, 596 P.2d 1001, 1003 (1979). *Id.* @ *9.

The evidence that Mr. Moholt hired merchandisers does not preclude a finding that he was improperly classified as an independent contractor and should have been classified as an employee.

DATED April 6, 2015.

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